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IN HER MAJESTY'S COURT OF APPEAL IN NORTHERN IRELAND

Armagh City Council's Application [2014] NICA 44

IN THE MATTER OF AN APPLICATION BY ARMAGH CITY AND DISTRICT COUNCIL FOR JUDICIAL REVIEW

Before: Morgan LCJ, Girvan LJ and Deeny J

MORGAN LCJ (giving the judgment of the court)

[1] This is an appeal on a preliminary issue determined by Treacy J in judicial review proceedings brought by the appellant in respect of a decision by the Northern Ireland Commissioner for Complaints ("the Commissioner") to uphold a complaint against the appellant. The appellant challenged whether the Commissioner had jurisdiction to accept the complaint from the relevant third party. The Commissioner for Complaints (NI) Order 1996 ("the 1996 Order") provides that, subject to certain exceptions, any person can make a complaint. By virtue of Article 10(1)(d)(ii) of the 1996 Order one of those exceptions is a body whose revenues consist wholly or mainly of moneys appropriated by Measure or provided by the Parliament of the United Kingdom. The appellant appealed on the grounds that the learned judge erred in law in rejecting the submission that it is the source of a body's revenue which determines whether the body is excluded and in any event in concluding that public monies received by GP Practices under a contract to provide services did not fall within the exclusionary provisions. Mr Goudie QC and Mr McEwan appeared for the appellant and Mr McGleenan QC and Mr McQuitty for the respondent. We are grateful to all counsel for their helpful oral and written submissions.

Background

[2] In May 2007 the Commissioner received a complaint from Dr Eoghan Fearon, a General Practitioner, on behalf of himself and his colleagues who operated the

doctor's surgery at Willowbank Surgery, Keady. Dr Fearon's complaint related to alleged maladministration by the appellant arising out of the proposed sale of lands owned by the appellant to Dr Fearon and his colleagues for the purpose of constructing a replacement doctor's surgery.

[3] In his final report dated 11 July 2012 the Commissioner found that the appellant had delayed in its dealings with Willowbank Surgery in the period from September 2002 until 20 June 2006. He was satisfied that the periods of delay caused the complainants inconvenience, frustration and upset and that they had sustained an injustice. He further found that the appellant was not open and transparent in its dealings with the complainant and that its failure to communicate properly with the complainants as to its powers in respect of the lands and to communicate the appellant's policy in respect of same constituted maladministration.

[4] He concluded that the appellant did not follow its own policy for the disposal of surplus land and that the failure to follow its own procedures caused the complainant to suffer an injustice because of the delay in bringing the application for approval by the Department of Environment at an earlier stage. The cumulative effect of delay, miscommunication and failure to follow its own procedures by the appellant resulted in the complainants being unable to obtain new purpose-built practice premises under the cost rent scheme. Finally the Commissioner was satisfied that the appellant failed to adequately and satisfactorily investigate the formal complaint by the complainant made to it in March 2007.

[5] The Commissioner met with officers of the appellant on two occasions to attempt to effect a settlement of the complaint but this was not possible. He recommended an apology, repayment of financial loss amounting to £28,362.51, a consolatory payment of £17,500 and publication of a copy of the appellant's procedures on disposal of land on its website.

Statutory Provisions

[6] The 1996 Order establishes the Northern Ireland Commissioner for Complaints and provides that, upon a complaint being made to him, he may by virtue of Article 7(5) investigate any action taken by or on behalf of the bodies listed in Schedule 2 of the 1996 Order or any action taken in the exercise of administrative functions of such a body. District Councils are included in the list of bodies in Schedule 2 as are Health and Social Care Trusts and the Regional Health and Social Care Board. By virtue of Article 7(2) of the 1996 Order the Office of the First Minister and deputy First Minister may by Order insert or remove bodies from the list in Schedule 2 but only if:

(a) the body is not a department; or

(b) the body either—

(i) exercises functions conferred on it by a statutory provision; or

(ii) has its expenses substantially defrayed out of moneys appropriated by Measure.

"Measure" should now be read as "Act of the Northern Ireland Assembly" pursuant to paragraph 3(3) of the Northern Ireland Act 1998.

[7] Article 8 of the 1996 Order makes provision for the Commissioner to investigate general health care providers who are defined by Article 8(1).

> "8. - (1) This Article applies to persons if they are-
>
> (a) individuals undertaking to provide general medical services or general dental services under Part VI of the Health and Personal Social Services (Northern Ireland) Order 1972;
>
> (b) persons (whether individuals or bodies) undertaking to provide general ophthalmic services or pharmaceutical services under Part VI of that Order; or
>
> (c) individuals performing personal medical services or personal dental services in accordance with arrangements made under Article 15B of that Order (except as employees of, or otherwise on behalf of, a health and social care body or an independent provider)."

[8] Article 10 deals with those who may make complaints.

> "10. - (1) A complaint under this Order may be made by any person other than-
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> (a) a department;
>
> (b) a district council or other body constituted for the purposes of local government;
>
> (c) a body constituted for the purposes of-
>
> (i) the public service; or

(ii) carrying on under national or public ownership any industry or undertaking or part thereof;

(d) any other body-

(i) whose members are appointed by Her Majesty, a Minister of the Crown, a department of the Government of the United Kingdom, the head of a department or a department; or

(ii) whose revenues consist wholly or mainly of moneys appropriated by Measure or provided by the Parliament of the United Kingdom;

(e) a member, at the time of the action complained of, of the body against which the complaint is made."

[11] The money to finance a Northern Ireland Department for each financial year is issued by the Department of Finance and Personnel out of the Consolidated Fund pursuant to the Budget Act for that year and is then appropriated for the purposes set out in a Schedule to the Budget Act. By way of example we were provided with the relevant legislation for the year ending 31 March 2012. Schedule 1 to the Budget Act (Northern Ireland) 2012 sets out the sums granted to each Department and the purposes for which the money was appropriated. A distinction was drawn between those sums which were described as expenditures in identified areas and those bodies which were identified as entitled to receive grant in aid. Family and community health services were identified as an area of expenditure. The Budget Act is the authority for the provision of funds to the DHSSPS and it then provides the funding to the Health and Social Care Board to enable it to secure family and community health services.

[12] The Health and Personal Social Services (Northern Ireland) Order 1972 imposed a duty on the Health and Social Care Board to provide and secure the provision of primary medical services under the Health and Personal Social Service (General Medical Services Contract) Regulations (NI) 2004 by entering into a general medical service contract with specified categories of persons including GPs. The contract is a contract for the provision of services and GPs are treated by HMRC as self-employed despite the fact that they are included in the health service pension scheme. GP practices can and often do deliver private services and thereby generate additional income revenue. GP contracts are not subject to procurement arrangements. In 2004 there was a change to the contract so that instead of contracting directly with each individual doctor the health board now contracts with

the Practice. GP Practices generally obtain over 90% of their revenue from public funds and it is accepted that the income of the complainant in this case was primarily from public funds.

[13] The 1996 Order repeals and replaces the Commissioner for Complaints Act (NI) 1969 ("the 1969 Act"). Section 6(1) of the 1969 Act, in so far as is relevant, provided:

> "(1) A complaint under this Act may be made by any person aggrieved, not being-
>
> (a) …
>
> (b) any other authority or body the majority of whose members are appointed by Her Majesty or the Governor or any Minister of the Crown or Minister of Northern Ireland or department of the government of the united Kingdom or of the government of Northern Ireland, or whose revenues consist mainly of moneys provided by Parliament or by the Parliament of the United Kingdom; or
>
> (c) …"

[14] The Notes on Clauses provided during the passage of the Bill stated, in relation to Clause 6, inter alia:

> "Sub-section (1) provides that a complaint may be made by any person (which by virtue of section 37 of the Interpretation Act (NI) 1954 includes any body or persons whether incorporated or not) subject to the exceptions specified in paragraphs (a) (b) and (c) of the sub-section. Eligible bodies include any private individual including any minor; and, for example, partnerships, companies, trade unions, and professional institutions.
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> The bodies which are excepted include bodies which are governmental either central or local and also those which are publically owned. The purpose of this exclusion is to avoid the absurdity of one public body invoking the Commissioner to pursue a complaint of injustice which it attributes to another public body. This would be a far cry from the underlying principle

> of the Bill which is to protect the private citizens in his dealings with public bodies.
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> The specific exceptions are as follows:-
> …
>
> Paragraph (b)
>
> …
>
> (v) any authority or body whose revenues consist wholly or mainly of money of moneys provided by Parliament; for example, the Ulster Museum, the Arts Council of Northern Ireland, the Ulster Folk Museum, the Northern Ireland Youth Employment Service Board;"

The decision of the learned trial judge

[15] Treacy J considered that the legislative purpose of Article 10(1)(d)(ii) was to ensure that disputes between public bodies are not resolved by the Commissioner, as evidenced by the Notes on Clauses in relation to the predecessor 1969 Act. He said it was clear that, as with other self-employed persons acting under a contract for services with a public body, GPs do receive money whose ultimate source may loosely be said to come from Parliament but that a distinction needed to be drawn made between those who received moneys directly by way of grant and those who received the moneys through a contract. Having considered how money for general medical services was disseminated, the learned judge considered that GPs did not appropriate by Measure or Act of the NI Assembly. It was the Department for Health which appropriated the monies through the Budget Acts of the Assembly and took exclusive possession of the funds under legislative authority in order that they may be used for the provision of health services in NI.

[16] GPs did not appropriate monies directly from the UK Parliament. The learned judge opined that it was the means by which monies were received and not the source which was determinative for Article 10(1)(d)(ii). The exclusion applied to any body which had a legal entitlement to public monies by legislation or could receive such monies directly from Parliament. Finally, the learned judge considered that to find otherwise would create an anomaly whereby GPs and other health service practitioners providing services under a general medical services contract would not have access to the Commissioner where they have been the victim of maladministration by a public body. That would differentiate between those GPs who conducted mainly NHS work and those who conducted mainly private work.

The submissions of the parties

[17] The appellant submitted that, contrary to the learned judge's contention, the focus of Article 10(1)(d)(ii) was on what the revenue consisted of and by whom it was provided, not on the process by which public money was transmitted from the provider to the recipient. Therefore, it was immaterial that the revenue received by GPs was not paid by way of a grant, it was public money paid by Parliament through the machinery of contracts with the NHS. Furthermore, the NHS was indeed their employer in every sense. It provided a public sector pension, life assurance and ill health retirement benefits and GPs were only treated as independent contractors for taxation purposes.

[18] The general medical services contracts themselves were public service contracts made with a public body. They were not private contracts entered into by the public authority and were not subject to public tendering as they were treated as internal within the health service. Unlike private contracts GPs were remunerated in part on the basis of the number of patients on the list rather than the value of the services actually provided for those patients. The terms of the contracts restricted the entitlement of the Practice to dispose of the goodwill. GPs could also benefit from the NHS Cost Rent Scheme whereby the Practice's building costs were provided out of public funds. By virtue of Schedule 1 of the Freedom of Information Act 2000 any person providing primary medical services was subject to the provisions of the Act.

[19] The appellant contended that GP Practices were public authorities when they discharged NHS functions, as contrasted with their position when conducting private practice as evidenced by the Lord Chancellor's Statement to the House of Lords during the passing of the Human Rights Act 1998 and also paragraph 51 of Part III of Schedule 1 to the Freedom of Information Act 2000. Finally, the appellant argued that the plain meaning must be given to Article 10(1)(d)(ii) (Pinner v Everett [1969] 1 WLR 1266) and "moneys … provided by the Parliament of the United Kingdom" plainly means moneys for which the UK Parliament is the source. The learned judge was only able to come to a contrary conclusion by reading in such words as "directly" and "as a matter of legal entitlement". All of this supported the conclusion that GP Practices were public bodies. The underlying purpose of the exclusionary provisions in Article 10 of the 1996 Order was to prevent public bodies complaining against each other. For those reasons the complainant fell within Article 10(10(d)(ii) of the 1996 Order.

[20] The respondent referred to his role in investigating complaints by private citizens against public bodies and submitted, given the significance of that role, that any attempt to restrict his jurisdiction to hear complaints must be viewed with caution. He further submitted that Article 10(1)(d)(ii) must be read in the context of other provisions within the 1996 Order, especially that of Article 7(3) which provided, inter alia, that a body cannot be included in Schedule 2 (bodies against whom complaints can be investigated) if it is a body which does not either exercise

functions conferred on it by a statutory provision or have its expenses substantially defrayed out of money appropriated by Measure. He argued that GPs are independent practitioners that have contracts of service, not contracts of employment, with the Heath Board. They are not employees of the Health Board but self-employed and subject to 'Schedule D' tax status. Each Practice draws down agreed funding at regular intervals from the Health Board based on an agreed formula, which is linked to the overall number of patients on each Practice list, and in return the Practice delivers services to that patient list.

[21] The Commissioner submitted that all public money came from Parliament but could be received by persons through a myriad of channels. In this respect the distinction between receiving moneys through a grant and receiving it under a contract for services was highly relevant. It was the Department of Health who appropriated the money by Measure. He further argued that since the first limb of Article 10(1)(d)(ii) referred to money appropriated from a delegated source, the second limb referred to situations where money was paid directly to the body by Parliament. Thus, upon a true construction of the provision, the learned judge was correct to find that it was the means by which the money was received and not the source from which it was received.

Consideration

[22] There was no dispute between the parties that the starting point in the interpretive exercise is to determine the natural and ordinary meaning of the words in the context of the statute. The Commissioner's power to investigate is dependent upon the making of a complaint by a person who claims to have suffered injustice. By virtue of section 37 of the Interpretation Act (NI) 1954 "persons" includes individuals, corporations and unincorporated bodies of persons.

[23] The distinction between bodies and individuals is also apparent in the 1996 Order itself, in particular in Article 8 which provides that individuals undertaking to provide general medical services are themselves subject to investigation. The same distinction in made in Article 8A dealing with independent providers of health services. That wording appears to reflect the fact that at the time of the passing of the 1996 Order each GP contracted individually with the Board. By contrast Article 10(1)(d) of the 1996 Order excludes bodies rather than individuals. It follows, therefore, that at the time of the passing of the 1996 Order GPs, who were treated for the purposes of the 1996 Order as individuals, could not be excluded from those who could complain by virtue of Article 10(1)(d) of the 1996 Order.

[24] The 2004 contract allowed GPs to contract as partnerships and companies. We are satisfied that the Commissioner was wrong to conclude that a GP partnership was not a body within the meaning of Article 10(1)(d) of the 1996 Order. The term is wide enough to include an unincorporated association and the notes on clauses to the 1969 Bill contradict any suggestion that a narrow interpretation should be given

to the term. The suggestion that a narrow interpretation should be applied because of the desirability of ensuring broad access to the Commissioner sits uneasily with the breadth of those who are excluded under Article 10, being significantly wider than bodies subject to investigation in Schedule 2 to the 1996 Order. This point was not pursued by the respondent on the appeal.

[25] Article 10(1)(d)(ii) excludes bodies of two kinds. The first is bodies whose revenues consist wholly or mainly of monies appropriated by Measure. Appropriation of monies requires the setting aside of the money for the benefit of the recipient. The recipient in a case falling within the provision is the body to be excluded. The question, therefore, is whether the Budget Act sets aside money for the benefit of the Practice.

[26] In our view that question must be answered in the negative. The Budget Act does not set aside any money for the Practice. It appropriates money for the Department which is then allocated to the Board. The Board can then use that allocation to enter into contracts with Practices. That outcome is not dependent upon the reading in of any words to the Statute. It recognises that the statutory exclusion is dependent upon the appropriation being effected by the Act rather than by some agency to which the money is appropriated.

[27] The second kind of body excluded by Article 10(1)(d)(ii) is one whose revenues consist wholly or mainly of monies provided by the Parliament of the United Kingdom. The principal submission advanced on behalf of the appellant was that this caught any body whose revenues consisted wholly or mainly of monies the source of which was an allocation or appropriation by Parliament. It was accepted, however, that such an approach would catch any commercial contractors whose revenues consisted wholly or mainly of contracts secured in public procurement exercises and bodies such as solicitors firms whose revenues consisted wholly or mainly of legal aid payments. Since it was clear that it was not intended to exclude such bodies some test of remoteness had to be introduced.

[28] We are satisfied that "monies provided by the Parliament of the United Kingdom" does not include all moneys the source of which can be attributed to Parliament. If that were correct there would be no need for the first limb in Article 10(1)(d)(ii) since the monies in the Consolidated Fund from which appropriations are made under the Budget Acts themselves are provided by the Parliament of the United Kingdom. The context points inevitably towards the proposition that this limb is intended to catch monies the source of which is other than the Consolidated Fund. The monies in this case were appropriated to the Department and then allocated to the Board out of the Consolidated Fund. It is not necessary for us to define this category further since that conclusion is sufficient to determine that the complainant in this case does not fall within the second limb of Article 10(1)(d)(ii).

Conclusion

[27] For the reasons given, in agreement with the learned trial judge, we find that the source of a body's revenue does not determine whether it should be excluded and that the complainant was not excluded by the terms of Article 10 (1)(d)(ii) of the 1996 Order from presenting a complaint to the Commissioner. The appeal is dismissed.